Supreme Court, U.S.
FILED
OCT 27 1994
OFFICE OF THE CLERK

(2)

NO. 94-609

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LOUIS PULASTY

Petitioner,

v.

STATE OF NEW JERSEY

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION

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32 pp

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT

POINT I: STATE CRIMINAL LAWS ARE NOT PREEMPTED BY ERISA; PENSION FUNDS WHICH ARE OTHERWISE PROTECTED UNDER ERISA ARE THEREFORE SUBJECT TO CRIMINAL RESTITUTION 8

POINT II: PETITIONER HAS FAILED TO DEMONSTRATE THAT THE RESULT REACHED BY THE NEW JERSEY SUPREME COURT IS IN CONFLICT WITH DECISIONS OF THIS COURT 15

POINT III: THE STATE COURT RULING IN THIS CASE IS NOT IN CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS 21

POINT IV: THERE IS NO FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE ENTRY OF PETITIONER'S GUILTY PLEA 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Brosamer v. Mark,
561 N.E.2d 767, 770 (Ind. 1990) ... 15,22

Commonwealth v. Federico,
419 N.E.2d 1374 (1981) 9,10

Ellis National Bank v. Irving Trust Co.,
786 F.2d 466 (2 Cir. 1986) 13,21

Guidry v. Sheet Metal Workers National
Pension Fund, 493 U.S.
365 (1990) 13,15,16

North Carolina v. Alford,
400 U.S. 25, 38 n.10 (1970) 23

Philpott v. Essex County Welfare Board,
409 U.S. 413 (1973) 18

Pomeranke v. Williamson,
478 N.W.2d 800 (Minn. App. 1991) ... 21

Porter v. Aetna Casualty Co.,
370 U.S. 159 (1962) 19

State v. Barboza,
115 N.J. 415, 421 n.1 (1989) 23

State v. Burten,
219 N.J.Super. 339 (Law Div. 1986) .. 10

State v. Newman,
132 N.J. 159 (1993) 14

State v. Pulasty,
136 N.J. 356, 361 (1994) 15

United States v. Brown,
744 F.2d 905, 910 (2 Cir. 1984) 17

United States v. Florence,
741 F.2d 1066, 1067 (8 Cir. 1984) ... 18

United States v. Palma,
760 P.2d 475, 479 (7 Cir. 1984) 18

Willet v. Georgia,
608 F.2d 538, 540 (5 Cir. 1979) 23

Statutes and Rules

N.J.S.A. 2C:20-4 .....

N.J.S.A. 2C:43-3 11

N.J.S.A. 2C:44-2a(2) 11

29 U.S.C. 1056 8

29 U.S.C. 1056(d)(1) 1,8

29 U.S.C. 1144(a) 9

29 U.S.C. 1144(b)(4) 12

38 U.S.C. 3101(a) 19

42 U.S.C. 407 18

INDEX TO APPENDIX

PLEA TRANSCRIPT..... Ra1-2

QUESTIONS PRESENTED

1. Whether a criminal restitution order is pre-empted by the anti-alienation provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1056(d)(1)?

2. Whether criminal restitution orders and civil judgments are sufficiently distinguishable to make case law concerning civil judgments inapplicable to the present case?

3. Whether pension funds covered by the Employment Retirement Income Security Act, 29 U.S.C. 1956, lose their protected status after disbursement to the pensioner?

4. Whether enforcement of state criminal restitution orders are consistent with the ERISA's underlying goal of protecting retirement funds for pensioners and their families?

5. Whether the Federal Constitution requires that a factual basis for a guilty plea be given by a defendant who does not proclaim innocence?

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The respondent, the State of New Jersey, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the New Jersey Supreme Court's decision reported at 136 N.J. 356, 642 A.2d 1392 (1994).

STATEMENT OF THE CASE

While the petitioner served as treasurer for the New Jersey State Fireman's Association, he and a co-defendant embezzled approximately $600,000 from the Association during a five year period. Petitioner pled guilty to second degree theft by deception under N.J.S.A. 2C:20-4, a crime carrying a five to ten year jail sentence. As part of his plea bargain, he agreed full restitution would be made.

Petitioner was sentenced on March 7, 1986 to a five year custodial term. Following a separate hearing held on May 16, 1986, petitioner was ordered to pay $453,378.32 in restitution. The hearing judge ordered that petitioner pay a lump sum of $200,000 and that the balance be paid in periodic installments.

Under the terms of the original restitution order, petitioner was required to make monthly payments of $2,000. After appeal, a new restitution hearing was held and the

periodic payment was reduced to $531 per month, an amount roughly equivalent to the $558 monthly pension received from the victim. This figure was arrived at by calculating petitioner's monthly income ($2,235), and deducting from it his monthly expenses ($1,493), leaving a balance of $742 per month. From this amount, the judge determined that petitioner had the ability to pay $531 per month, leaving him with a monthly excess of $211.

With regard to the lump sum, petitioner was credited with approximately $98,000 which he had attempted to sequester under an account in his wife's name and a second sum of $15,000 which he placed in a trust account with his attorney.

On September 25, 1989, the new restitution order was affirmed by the Appellate Division. On July 19, 1990, petitioner moved before the trial judge to further change the terms of the

restitution. He argued that his social security and pension fund benefits were exempted under federal law from assignment, garnishment or income execution. None of these arguments were raised on direct appeal.

While petitioner's motion was pending, it was discovered that between February 12, 1988 and May 2, 1988, petitioner filed three separate requests with the Internal Revenue Service to increase the amount withheld from his pension check to $260 per check. He did this for 1988 and 1989, years in which he had no taxable income. Petitioner evidently hoped to reduce the amount of money available to satisfy the restitution order and recoup the funds by requesting refunds from the I.R.S. This scheme was uncovered, however, and the judge found defendant to be $5,534.17 in arrears.

On October 31, 1990, an amended order of restitution was entered. Rejecting the

argument that petitioner's pension benefits were unavailable to satisfy the restitution order, the trial judge neither reduced nor eliminated the $531 monthly payment. The judge did, however, reword the restitution order to eliminate any language requiring assignment of pension benefits. The amended order also directed defendant to immediately pay the $5,534.17 arrearage.

It is from this amended order that petitioner now appeals.

REASONS FOR DENYING THE WRIT

POINT I

STATE CRIMINAL LAWS ARE NOT PRE-EMPTED BY ERISA; PENSION FUNDS WHICH ARE OTHERWISE PROTECTED UNDER ERISA ARE THEREFORE SUBJECT TO CRIMINAL RESTITUTION

At the hearing below, it was established that the pension benefits received by the petitioner from the victim were part of a plan covered by the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1056. ERISA contains an anti-alienation clause which provides, "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). Petitioner claimed his pension benefits were therefore unavailable to satisfy the restitution order below.

ERISA contains a broad pre-emption provision which provides, under section (a), that the statute shall "supersede any and all state laws" relating to any covered employee

benefit plan. 29 U.S.C. 1144(a). The provision sets forth specific exceptions to this pre-emption language. Relevant here is section (b)(4):

> Subsection (a) of this section shall not apply to any generally applicable criminal law of a state.

Thus, if state criminal restitution is a "generally applicable criminal law" within the meaning of the statute, section (b)(4) is dispositive of petitioner's claims. In other words, if criminal restitution is a "general" penal law, ERISA does not preclude the application of such law to pension funds.

The definition of "generally applicable law" can be found in Commonwealth v. Federico, 419 N.E.2d 1374 (1981), a case deciding whether an employer's failure to make required contributions to a pension plan can be prosecuted under state law. The case holds:

> The 1144(b)(4) exception from pre-emption for "generally applicable" state criminal laws

> appears designed to prevent otherwise criminal activity from being immunized from prosecution simply because the activity "relates to" an employee benefit plan. The exception seems directed towards criminal laws that are intended to apply to conduct generally criminal laws against larceny and embezzlement for example. By virtue of 1144(b)(4), a state is not precluded from prosecuting, under a theft statute applicable to the entire population, an employer who steals money from an employee benefit plan. But by limiting the 1144(b)(4) exception to criminal laws of general applicability, Congress apparently intended to preempt state criminal statutes aimed specifically at employee benefit plans.

Federico, supra at 1377-78. The court concluded that penal laws enforcing contribution requirements to pension plans are not generally applicable laws. Such laws are designed solely to regulate employee benefit plans and are therefore pre-empted by ERISA. See also, State v. Burten, 219 N.J.Super. 339 (Law Div. 1986).

In the present case, the question is whether state criminal restitution statutes are pre-empted by ERISA if the petitioner must draw on pension funds to satisfy their terms. Nothing in the restitution statutes themselves indicates they are pre-empted by ERISA. Authority for restitution is derived from N.J.S.A. 2C:43-3 which permits a sentencing court to impose restitution on any person who has been convicted of "an offense". N.J.S.A. 2C:44-2a(2) makes restitution potentially applicable in any case where the sentencing judge finds that deterrence or rehabilitation would be served by the imposition of restitution. Thus, restitution is clearly a penal sanction of a general nature which is applicable to a broad range of criminal conduct.

That a criminal restitution order may reach pension funds which are otherwise protected by ERISA does not alter this conclusion. Burten and Federico teach that

pre-emption is not required simply because the State enacts criminal regulatory law in an area covered by ERISA. 29 U.S.C. 1144(b)(4) indicates that some overlap is permissible. Only in those instances where the State attempts to enforce criminal statutes specifically designed to regulate employee benefit plans will the pre-emption provisions of ERISA preclude State action. Here, the restitution order is no more precluded by ERISA than is the petitioner's underlying theft conviction. Both the conviction and the sentence "relate to" an employee benefit plan, but neither rests on a statute aimed solely at employee benefit plans. Thus, neither runs afoul of ERISA's pre-emption provisions.

The exemption of criminal restitution orders from ERISA's anti-alienation provisions is entirely consistent with the goals of ERISA. ERISA has never been read to preclude all assignments and alienations of pension fund

benefits. Ellis National Bank v. Irving Trust Co., 786 F.2d 466, 470 (2 Cir. 1986). Family support orders are routinely recognized as special exceptions. Id. Like the family support order, the exemption for the enforcement of criminal law is based on the paramount need of the claimant. Here the "claimant" is the State of New Jersey, which surely has a fundamental interest in deterring those in fudiciary positions - like the one held by petitioner - from using such positions to embezzle funds. By exempting criminal laws from the statute, ERISA ensures that the State will pursue its interest, enabling the State to safeguard pension funds from would-be thieves, thereby furthering ERISA's underlying goal of ensuring that pension funds will be available for pensioner's and their families. Guidry v. Sheet Metal Workers National Pension Fund, 493 U.S. 365, 376 (1990). Moreover, New Jersey's criminal restitution statute is particularly

compatible with ERISA, given its mandate to consider the defendant's ability to pay. State v. Newman, 132 N.J. 159 (1993). Hence, restitution orders in New Jersey do not impede ERISA's goal of protecting the welfare of the pensioner and his family. In short, there is both statutory case precedent and social policy justification for the principle that ERISA was never intended to preclude the enforcement of State criminal restitution orders.

POINT II

PETITIONER HAS FAILED TO DEMONSTRATE THAT THE RESULT REACHED BY THE NEW JERSEY SUPREME COURT IS IN CONFLICT WITH DECISION OF THIS COURT

The New Jersey Supreme Court's holding in this case was that pension funds lost their protected status once they were paid out to petitioner and that converted funds could therefore be used to offset the restitution order. The court observed that ERISA was designed only to guarantee a steady stream of income to pensioners, "not to make them judgment proof". State v. Pulasty, 136 N.J. 356, 361 (1994), citing Brosamer v. Mark, 561 N.E.2d 767, 770 (Ind. 1990). Defendant claims this interpretation of ERISA conflicts with this Court's holding in Guidry v. Sheet Metal Workers National Pension Fund, supra, at 493 U.S. 365.

No such conflict exists. Guidry interprets ERISA to determine the "narrow question of whether that judgment may be

collected through a particular means - a constructive trust placed on the pension". Id. at 376 (emphasis is the Court's). Thus, Guidry dealt with the attempt to divert pension funds before they were actually received by the pensioner. Here, the amended restitution order was re-worded to eliminate any reference to the assignment of pension funds. (See Statement of the Case, herein). Unlike Guidry, the petitioner in this case actually received his pension benefits.

Guidry is also distinguishable on other grounds, albeit ones not addressed by the New Jersey Supreme court. Guidry was a civil case which held that ERISA's anti-alienation provisions precluded all forms of garnishment of pension funds to satisfy civil judgments. It provides no authority for the proposition that one who is convicted of a theft-related offense is insulated from criminal penalties such as restitution. Criminal and civil

penalties are not viewed as interchangeable. United States v. Brown, 744 F.2d 905, 910 (2 Cir. 1984). Procedural rules applicable to civil judgments do not necessarily apply to criminal restitution, even if such restitution has "characteristics of a civil judgment". Id. at 909.

The distinction between criminal and civil penalties is well recognized. In United States v. Brown, supra, the Court held that criminal restitution is not subject to the same procedural rules which apply to civil judgments:

> We reject the premise of defendant's argument that a sentencing provision with characteristics similar to that of a civil judgment is subject to the requirements of a civil adjudication. So long as the restitution is a permissible form of punishment, it is not subject to civil requirements simply because it also achieves some of the purposes of a civil judgment. Restitution undoubtedly serves traditional purposes of punishment. The prospect of having to make restitution adds to the deterrent effect of imprisonment and fines, penalties that might seem to some

> offenders less likely to be imposed than restitution. Restoring the victim's property also serves the legitimate penal purpose of vindicating society's interest in peaceful retribution. Finally, restitution can be a useful step toward rehabilitation, a consequence specifically emphasized by congress.

Id. at 909. See also, United States v. Palma, 760 F.2d 475, 479 (7 Cir. 1984) (observing the differences between criminal and civil restitution); United States v. Florence, 741 F.2d 1066, 1067 (8 Cir. 1984) (same). Given these considerations, it would be error to read a civil case like Guidry to cover criminal penalties as well as civil.

Nor was the New Jersey Supreme Court's decision in conflict with Philpott v. Essex County Welfare Board, 409 U.S. 413 (1973). Philpott holds that social security benefits deposited in a trust account were not available to reimburse the State of New Jersey for welfare disbursements. The benefits were protected by 42 U.S.C. 407 which imposed a

broad bar against the use of any legal process to reach "moneys paid or payable" as social security benefits. Funds deposited in the trust account on the pensioner's behalf, not yet disbursed from that account, were considered "moneys paid" and thus exempt from any claimant. Accord, Porter v. Aetna Casualty Co., 370 U.S. 159 (1962) (civil creditor cannot attach savings and loan accounts into which disability compensation protected by 38 U.S.C. 3101(a) have been deposited).

In the present case, the State did not seek to attach petitioner's pension funds. As noted above, the restitution order was worded to avoid any reference to pension funds. More importantly, the amount of the periodic payment was based on petitioner's income minus expenses. (See Statement of the Case, herein). Thus the judge did not simply require that petitioner divest himself of pension funds. Accordingly, the order he issued had all the

earmarks of criminal restitution and none of the characteristics of the civil remedies considered in Guidry and Philpott.

It follows from the foregoing that the New Jersey Supreme Court's decision was not inconsistent with the holdings of this Court.

POINT III

THE STATE COURT RULING IN THIS CASE IS NOT IN CONFLICT WITH DECISIONS OF OTHER JURISDICTIONS

Petitioner contends the result in the instant case is inconsistent with decisions in other jurisdictions. However, the two cases cited by petitioner are easily distinguishable in that they do not involve the enforcement of state penal laws.

Ellis National Bank v. Irving Trust Co., supra at 786 F.2d 466, involved an attempt by a trustee of an ERISA protected plan to set up a constructive trust of funds stolen from the plan. The Ellis Court specifically noted that the case did not involve criminal sanctions. Id. at 470.

In Pomeranke v. Williamson, 478 N.W.2d 800 (Minn. App. 1991), the Court considered whether ERISA protected funds could be released to satisfy court ordered restitution to the victims of a pensioner's criminal conduct. The

finding that the funds were unavailable for this purpose turned on the conclusion that the restitution was not a criminal sanction: it was not a condition of probation and it was docketed as a civil judgment. Id. at 282.

Petitioner also mentions a possible conflict with Brosamer v. Mark, supra, based on the protected status of social security funds. However, the restitution order below did not reach petitioner's social security benefits since the pension benefits ($558 per month) were sufficient to satisfy the monthly payments ($531 per month). Any holding in Brosamer relevant to the exemption of social security benefits is therefore of no consequence to the instant case.

POINT IV

THERE IS NO FEDERAL CONSTITUTIONAL QUESTION RAISED BY THE ENTRY OF PETITIONER'S GUILTY PLEA

Petitioner contends that his guilty plea was entered without a sufficient factual basis. However, a factual basis for a plea is not constitutionally required unless the entry of the plea is accompanied by a claim of innocence. North Carolina v. Alford, 400 U.S. 25, 38 n.10 (1970); Willet v. Georgia, 608 F.2d 538, 540 (5 Cir. 1979); State v. Barboza, 115 N.J. 415, 421 n.1 (1989).

Petitioner has never proclaimed his innocence. At the plea hearing, he expressly acknowledged his participation in the embezzlement scheme. (Respondent's Appendix 1-2). Hence, there is no federal constitutional question raised by the entry of petitioner's plea.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

CLIFFORD J. MINOR
ESSEX COUNTY PROSECUTOR

Hilary L. Brunell

HILARY L. BRUNELL, ESQ.
LEGAL ASSISTANT

HLB:md
DATE: October 18, 1994

THE COURT: What was your job there?

THE DEFENDANT: Posting -- well, the title was treasurer and as part of the duties I was required to post the results of all checks issued and summarize it each quarter and on an annual basis. At the end of each year we started from scratch again.

THE COURT: All right.

Specifically, with regard to this over six hundred thousand dollars that the state says you and Ms. Furtney took that you were not entitled to, can you tell me about that how you did that and give me some examples of what are some of the things that you did?

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THE DEFENDANT: Some of the checks issued were for personal services and materials and it just got out of hand, I would say, and got away from us, got away from me, that is, you know.

MR. D'ALESSIO: There were several categories of checks. There were hundreds and hundreds of checks over the five year period and we can summarize them for you if you wish. But, basically, the state's case to which we plead is that personal expenses were paid from

the business, unauthorized expenses were paid and there were monies paid to vendors who did not exist or vendors whose invoices were significantly less than that which was paid them.

THE COURT: Are these things true, Mr. Pulasty?

THE DEFENDANT: Yes, they are.

THE COURT: Among the other things you directed that checks be written out to people who did not exist?

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THE DEFENDANT: I would say so, yes.

THE COURT: When these checks were--what happened after the checks were written out, how did they get cashed?

THE DEFENDANT: I believe Ms. Furtney did the cashing. I wasn't aware of this at the time. But I did detect that there was something wrong after posting the ledgers.

THE COURT: Well, wait a minute. How would a check--who would direct or tell Ms. Furtney to write out a specific check to someone who did not exist? Did you ever do that?

THE DEFENDANT: No, sir.